October 28, 2015

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: *Notice of Ex Parte Communication, MB Docket Nos. 10-71, 15-216*

Dear Ms. Dortch:

NAB submits this letter as a record response to a member survey recently conducted by NTCA-The Rural Broadband Association and Incompas (the association formally known as COMPTEL) entitled "video competition," but primarily focusing on retransmission consent.[1] This survey, which was released to the press but, curiously, not submitted to the Commission, is far from scientific and unsurprisingly designed to reach a particular result. While NTCA and Incompas have perhaps been too sheepish to submit their survey, NAB has attached it to this letter to give the Commission some idea of how empty NTCA's and Incompas's efforts have been. If this continues to be the level of seriousness with which the pay TV industry treats the above-referenced proceeding, we urge the Commission to close it quickly so stakeholders can get on with the business of serving the American public.

There are several significant flaws with the attached survey – starting with the fact that it was obviously conducted to produce a policy-driven outcome. Apparently, NTCA/Incompas conducted the survey *themselves* rather than hiring an independent, and objective, third party. Survey participants, which included only NTCA and Incompas members, were likely aware that their answers would be used as policymaking ammunition, and therefore more likely to answer in self-interested ways that would help advance pay TV's cause. This type of inherent and blatantly obvious bias destroys the credibility of the survey.

[1] *See* Attachment, "NTCA-The Rural Broadband Association and Incompas' 2015 Video Competition Survey" ("Survey"). Following in the footsteps of Mediacom's ridiculed Petition for Rulemaking it filed this summer asking the Commission to mandate carriage of a local broadcast station if it did not meet a set standard for over-the-air penetration, the attached survey is a risible bit of proselytism masquerading as serious work. NAB has chosen to attach the survey and submit it into the record so that the Commission is aware of the disinformation campaign driven by pay TV lobbyists and being played out in the press.

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Because the survey results fail to include a list of the specific questions that NTCA and Incompas members answered, it is difficult to judge exactly to what degree the questions were presented to lead to particular responses. However, much of the language in the survey report suggests that the questions were asked in a manner that would invite strongly anti-broadcaster reactions from the pay TV respondents. For example, in the "Retransmission Consent Negotiation Challenges" section, the language repeatedly reinforces the notion that pay TV companies are supplicants to broadcasters and apparently subject to a kind of negotiating torture during retransmission consent discussions.[2] Words and phrases like "require," "subject to," "forced," "faced a threat," "threatened," "faced demands" and "block access" – all written as actions taken against MVPDs – augment the respondents' biases toward broadcasters. This language echoes another "survey" submitted by NTCA, in which pay TV operators were asked, among other things, to rate their "frustration" with their most recent round of retransmission consent negotiations.[3]

Beyond the built-in biases and loaded language, the attached survey is further flawed by the nature of the questions asked, and more importantly, what is not asked. The survey questions and responses push a clear and driving theme throughout – broadcasters are requiring compensation for the content you resell to viewers; please explain whether you'd like to pay less for that content. The survey also attempts to show that respondent companies are struggling in the marketplace against an onslaught of competition and rising programming prices. Collectively, these themes support the pay TV industry's false narrative that MVPDs need government intervention to stop broadcasters from destroying the pay TV business. Naturally, the survey does not include questions that could undermine this narrative, such as: "How profitable are your voice and broadband services?"; "Are you gaining or losing broadband subscribers?"; or "Are your payments to programmers based on ratings?"

Indeed, while the survey clearly asked numerous specific questions about retransmission consent negotiations,[4] apparently no such questions were asked about NTCA/Incompas members' negotiations with non-broadcast programmers. And while the survey inquired about the *percentage* increases in both retransmission consent fees and nonbroadcast programming fees, the survey did not report the actual amounts of any fees and certainly did not compare retransmission fees and nonbroadcast programming fees on a per viewer basis. So, for example, there is a far cry from describing a rate increase as "100%" versus detailing the actual figures, which could merely be an increase from $.05 to $.10 per subscriber.

Finally, NTCA/Incompas's conclusory argument that broadcasters are somehow responsible for lower broadband adoption rates is especially bizarre and misleading.[5] Their house-of-

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[2] Survey at 4-5.

[3] *See Ex Parte* Letter from Michael R. Romano, NTCA – The Rural Broadband Association, in MB Docket No. 15-216 (filed Sept. 14, 2015).

[4] *See* Survey at 4-5.

[5] Survey at 6.

cards logic goes something like this – broadcasters charge too much for their signals, causing MVPDs to drop video service which somehow causes broadband adoption rates to fall. Causation is tenuous to say the least, especially considering how many other costs are baked into a consumer's pay TV bill that drive up prices and cause customers to drop their video service – including, but certainly not limited to, the cost of nonbroadcast programming and the sky-rocketing costs to lease or buy mandatory in-home equipment.

Additionally, NTCA/Incompas's argument is contradicted by almost every measurable video marketplace trend. For example, the varied and rapidly expanding selection of over-the-top video services is pushing many pay TV customers to cut (or never adopt) the cord and rely on a combination of broadband and free, over-the-air broadcast for their entertainment and information needs.[6] Local broadcasters and TV networks are engaging with customers via online platforms just as they do through traditional means like pay TV subscriptions.[7] In light of these obvious trends, it is increasingly implausible to argue that a consumer must subscribe to a pay TV service to see the benefits of a broadband subscription. Pay TV providers are simply lamenting the fact that their decade-long run of fat profit margins from two different businesses deriving from one pipe may be finally slowing down. But in any event, just as it has been the case for decades in subscription television, pay TV companies remain the "essential gatekeepers" between programmers and customers in the broadband world.[8] The suggestion that the Commission should adjust its video policies to aid an industry that merely moved from one gatekeeping role into another cannot be reconciled with the public interest.

Despite the pay TV industry's desperate efforts, there is no evidence of a marketplace failure in the distribution of video entertainment and information – indeed, the available evidence increasingly suggests otherwise. The Commission should ignore the pay TV industry's attempts to manufacture evidence, such as their recent biased survey, to justify their arguments for government intervention in the retransmission marketplace favoring pay TV gatekeepers.

[6] *See, e.g.,* Michael Newberg, "Cable companies given walking papers at intensifying pace," CNBC (Sept. 19, 2015) (Recent data "show that the so-called "cord-cutting" phenomenon—where consumers jettison traditional cable and satellite packages in favor of streaming services—is about to get a lot worse. A new report by Magid Advisors surveyed 2,400 consumers and found that cord cutting is not only on the rise, but it's happening much quicker than industry watchers anticipated.").

[7] For example, according to the Radio Television Digital News Association, every television station that provides local news also has a website that provides local news, and more and more local stations provide full, live streaming newscasts on their websites. Bob Papper, *Tracking what's new online*, RTDNA (Apr. 20, 2015), http://www.rtdna.org/article/research_tracking_what_s_new_online#.VUfg-dVhBc. In addition, five major station groups have together formed NewsON, an advertiser-supported service that will let viewers watch their local TV news on smartphones and tablets no matter where they are. *See* Harry A. Jessell, "TV Groups Team Up To Offer Local News App," TVNewsCheck (June 9, 2015).

[8] William Baer, Assistant Attorney General, Keynote Address at the Future of Video Competition and Regulation Conference, Duke Law School (Oct. 9, 2015).

Respectfully submitted,

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Executive Vice President and General Counsel
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NTCA–The Rural Broadband Association and INCOMPAS'
2015 Video Competition Survey

New survey finds 95% of small MVPDs and new entrants into the video market struggle to obtain reasonably-priced programming, and 40% report retransmission consent fee price increases of more than 100% during the current contract cycle.

Recently, the FCC has shown increased interest in issues that promote video competition, and has issued a Notice of Proposed Rulemaking (NPRM) addressing the good faith negotiating standard in retransmission consent. Furthermore, the Commission is considering an Order to eliminate the agency's outdated program exclusivity rules.

In September of 2015, NTCA and INCOMPAS ("the associations") conducted a survey of their membership to gather data and information regarding their provision of video services and their experience negotiating with broadcasters and other entities for content.

The survey was conducted online. The URL was sent to each of the associations' member companies.

A total of 226 companies participated in the survey, comprised of both NTCA and INCOMPAS member companies. The NTCA respondents are small incumbent providers offering voice, broadband, wireless and video service to rural America, while the INCOMPAS respondents are competitive wireline broadband providers offering residential video (MVPD) , broadband, and voice services.

Based on this sample size, the results of this survey can be estimated to be accurate within +/- 6% at the 95% confidence level.

SURVEY RESULTS

<u>Overview – Video Service Provision</u>

- **87%** of survey respondents currently provide video service. Of those who do not, **31%** plan to do so in the immediate future, **38%** do not, and **31%** are not sure.

- **77%** of those providing video service do so via IPTV, **47%** via Cable TV, and **2%** via resale DBS. **6%** do so via some other means. (Among the INCOMPAS member companies only, **100%** use IPTV, **40%** cable and **40%** resale DBS.)[1]

- **49%** compete with an incumbent cable company or non-DBS provider some portion of their service territory, **10%** in 100% of their service territory, and **40%** do not face competition. (Among INCOMPAS members only, all face competition: **29%** compete in some portion of their service territory, and **71%** in 100% of their service territory.)

[1] Totals exceed 100% as respondents may utilize more than one means of providing video service.

- **72%** of survey respondents have considered eliminating certain broadcast and/or non-broadcast programming and/or refrained from entering a market altogether as a result of rising programming costs.

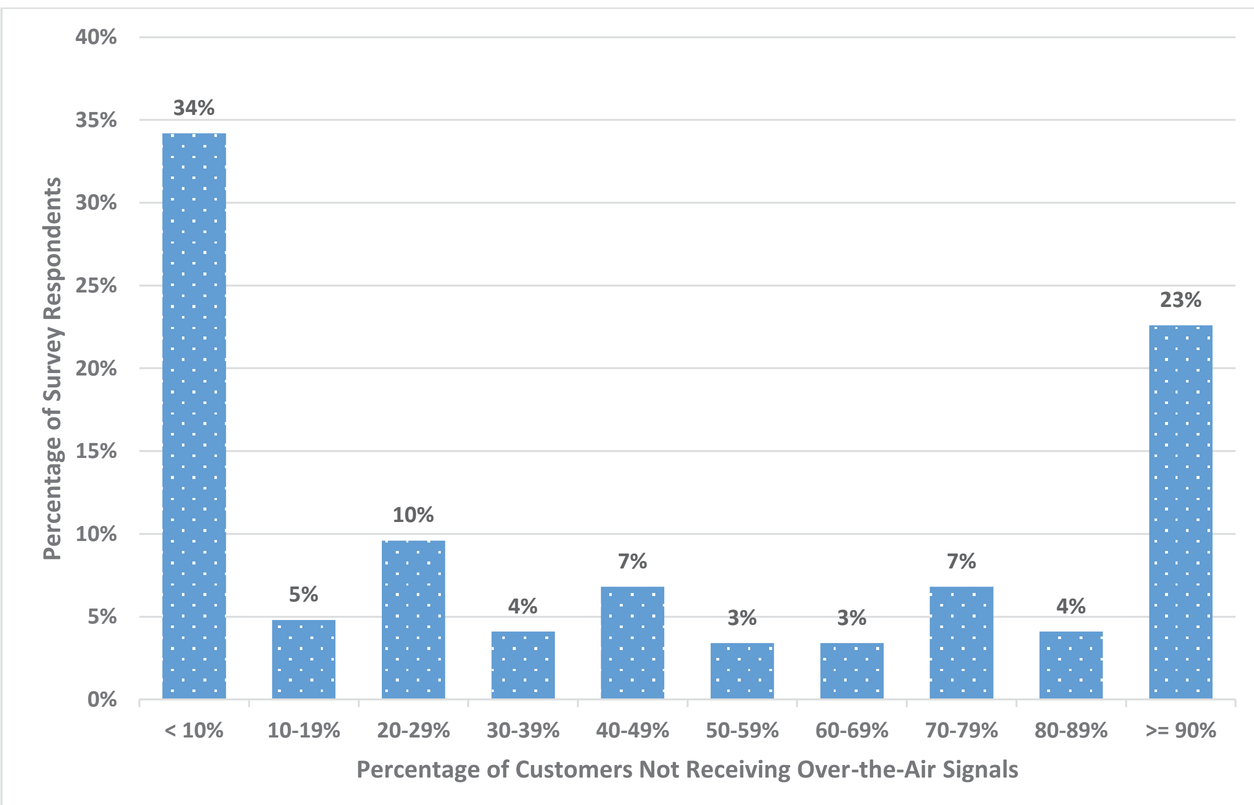
- **12%** have ceased offering video service in a market where they previously offered service.

- **74%** have experienced video subscriber losses in any market in the past year.

Importance of Providing Video

- **52%** have experienced an uptick in broadband adoption in the markets in which they provide video service.

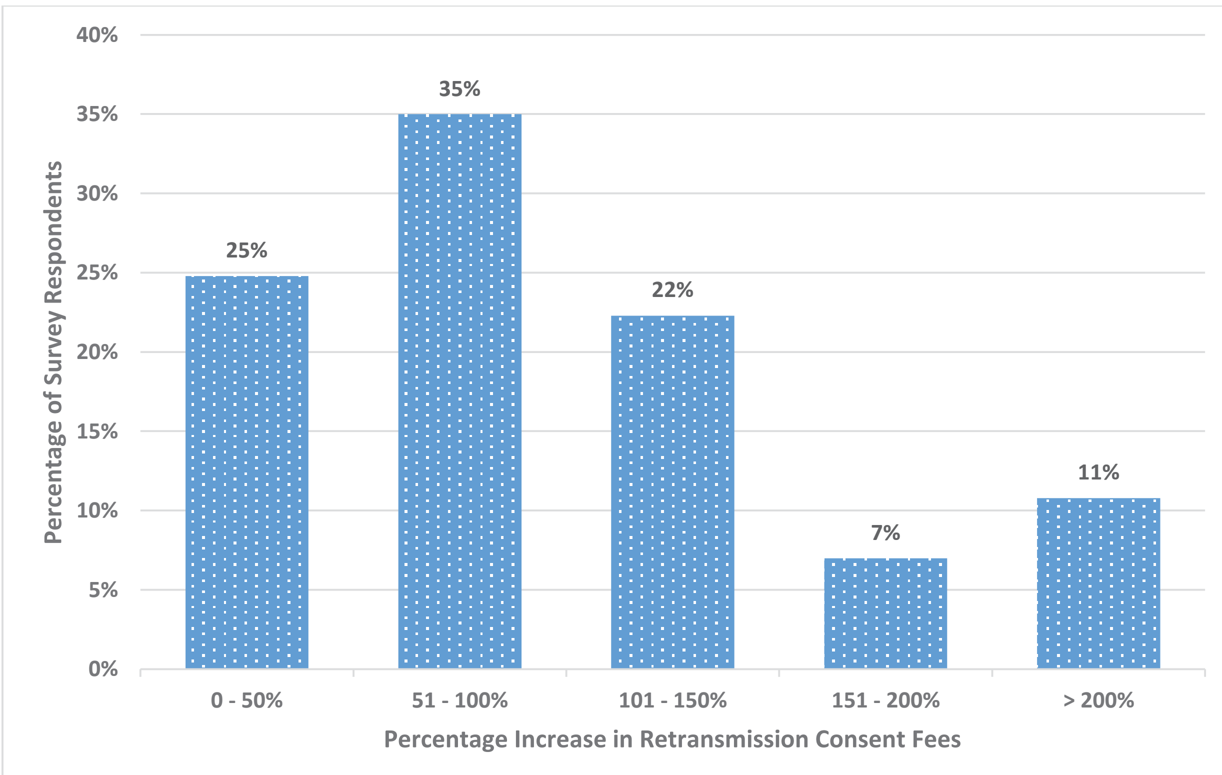
- Respondents were asked what percentage of their service area households cannot receive over-the-air broadcast signals. **34%** of respondents reported that 10% or less of their customers cannot receive over-the-air broadcast signals, while a total of 40% responded that 50% or more of their customers could not receive over-the-air broadcast signals. In fact, **23%** reported that 90% or more of their customers cannot obtain over-the-air broadcast. The complete results are as follows:



__Barriers and Challenges to Providing Video__

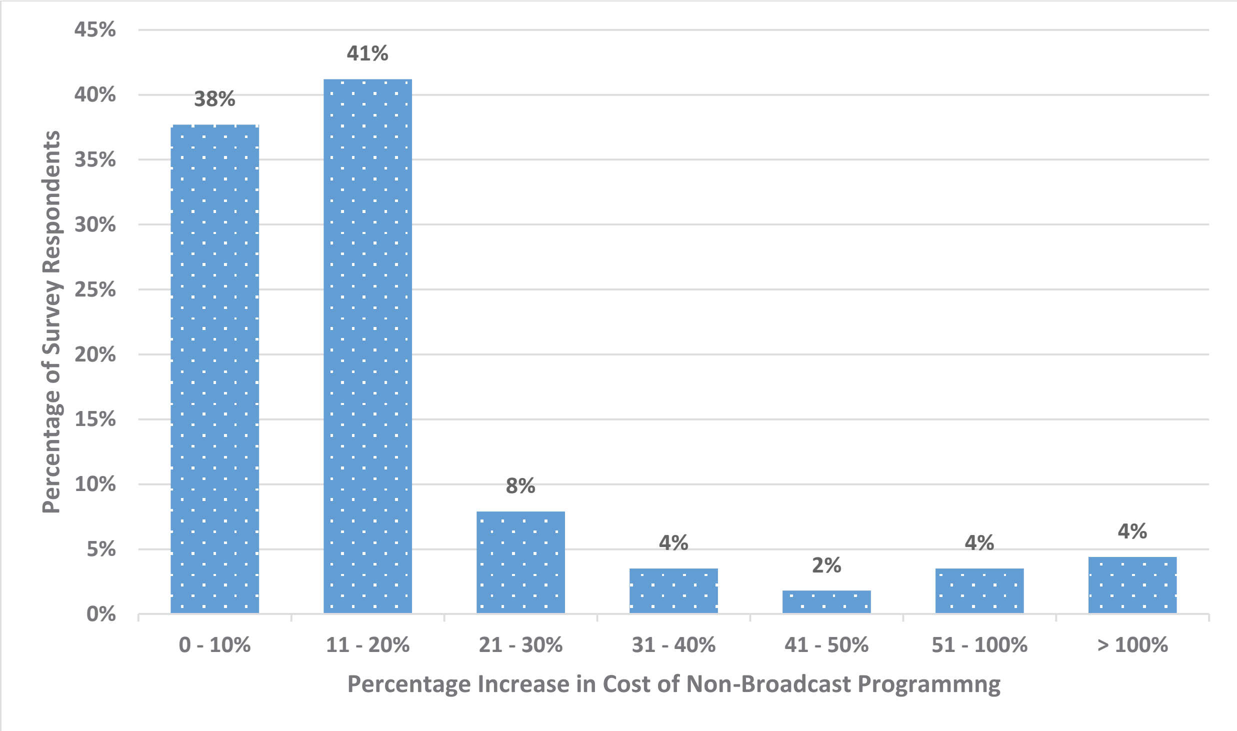
- The single biggest barrier to providing video service is obtaining access to reasonably-priced programming, cited by **95%** of respondents. Other barriers cited include competing with other providers (**53%**), making a business case for video (**53%**), the cost of necessary customer premise equipment (i.e., set top box) (**36%**), cost of necessary network equipment (**35%**), obtaining/acquiring customer premise equipment (**4%**), obtaining/acquiring network equipment (**4%**), and obtaining financing (**2%**).[2]

- **40%** reported percentage increases in retransmission consent fees during the current contract cycle in comparison to the previous contract cycle of more than 100%. **11%** reported increases of more than 200%. The complete results are as follows:



- **38%** reported percentage increases in the cost of non-broadcast programming during the current contract cycle in comparison to the previous contract cycle of between 0 and 10%. **41%** reported increases of 11 to 20%. The complete results are as follows:

[2] Totals exceed 100% as respondents were allowed to select more than one barrier.



<u>**Retransmission Consent Negotiation Challenges**</u>

- **69%** of survey respondents have had a broadcaster require them to obtain non-broadcast programming and/or services (e.g., less-popular networks, multicast streams, duplicative stations, significantly-viewed stations, after-acquired or unlaunched programming services, etc.)

- **65%** have been subject to tier placement and/or subscriber penetration requirements that limit the manner in which broadcasting is offered to their subscribers.

- **44%** have been forced to participate in coordinated broadcast contract negotiations (including networks negotiating on behalf of affiliates or a third party negotiating on behalf of multiple non-commonly owned stations across markets.)

- **46%** have faced a requirement that negotiations for broadcast programming take place at the same time as negotiations for other affiliated "must-have" programming (e.g., regional sports networks, highly-rated multicast or lower power stations, popular national programming networks, etc.)

- **49%** have faced a threat to withhold or black out a broadcast station or network in a time period approaching the airing of popular sports, entertainment, or other marquee programming content.

- **45%** have been threatened with invocation of the FCC's program exclusivity protections during negotiations.

- **5%** have had a broadcaster or other programmer block access (or threaten to block access) to its online content for video subscribers, **2%** for their Internet subscribers, and **9%** for both their video and Internet subscribers (**16%** total.)

- **20%** have faced demands for fees for their voice and/or Internet services subscribers who do not take their video service.

- **22%** have had broadcasters demand fees for programming that is not subject to negotiation.

- **6%** have had broadcasters demand fees for subscribers who do not take broadcast channels (e.g., over-the-air programming, foreign language-only programming, etc.)

- **22%** have faced demands for the placement of limitations on subscribers' use of lawful devices and/or functionalities.

- **17%** have faced demands for installation of a set-top box in each subscriber's home on each television receiver. (Among INCOMPAS members only, **40%** have faced such a demand.)

- **48%** have faced contract provisions that prevent disclosure of rates, terms, and/or conditions or a contract proposal or agreement to a governmental entity and/or court of competent jurisdiction.

- **92%** have been unable to obtain a Most Favored Nation (MFN) provision in contracts with broadcasters and/or other programmers.

- **25%** have had a broadcaster restrict access to online streaming and/or other digital transmission rights to broadcast programming.

- **25%** have had a broadcaster propose contractual language that would require them to comply with regulations even if/when the FCC has modified or eliminated their applicability.

Conclusions

- **Sky High Prices: NTCA and INCOMPAS member companies seeking to provide video service to their customers must deal with exorbitant price increases for both broadcast and non-broadcast programming.** Forty percent of survey respondents reported increases in retransmission consent fees of more than 100% during the current contract cycles; 11% reported increases in excess of 200%. And while the percentage increase in the cost of non-broadcast programming seemed tame by comparison—62% of respondents reported increases during the current contract cycle of greater than 10%, and 21% reported increases of greater than 20%--this, too is quite extreme next to the growth in the Consumer Price Index (CPI). The

CPI, a widely recognized measure of overall inflation in the economy, grew by a mere 0.2% between August 2014 and August 2015.[3] (Even removing volatile food and energy prices results in CPI growth of only 1.6% over the same time period.[4]) Clearly, programming costs are rising at a rate well in excess of inflation, with the result that our members absorb theses costs due to the video competition they face in the marketplace. Such dramatic increases pose a significant threat to the ongoing viability of these small companies' operations, including their ability to upgrade their networks and deploy more broadband.

- **Competition Needs a Package Deal: In order to remain competitive in today's marketplace, NTCA and INCOMPAS member companies need to be able to offer packages of voice, broadband and video.** Today's consumers are increasingly drawn to "triple play" packages—bundled service packages that include voice, broadband and video service. If a provider is unable to provide any one of the three components of the triple play, they are placed at an insurmountable disadvantage compared to larger competitors. Additionally, more than half of survey respondents reported that offering video leads to an uptick in broadband adoption rates. Without the ability to offer video, broadband adoption rates would likely fall, contrary to the Commission's ongoing efforts to increase broadband adoption throughout the country and contrary to the Commission's goal of promoting multiple broadband offerings to consumers.

- **Big Broadcaster Control: Broadcasters hold an overwhelming advantage in contract negotiations, and as a result offer small companies unrealistic contract terms.** Survey results clearly show that NTCA and INCOMPAS member companies are not able to exert any type of leverage in their negotiations with programmers. Actually, "negotiation" may not be the proper term to use, as many companies report having terms of service dictated to them with no opportunity to procure more favorable terms. This one-sided tilt in the balance of power results in outcomes that unfairly favor the programmers, and harm the small providers and, ultimately, their current and potential customers.

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[3] U.S. Bureau of Labor Statistics, "CPI Detailed Report, Data for August 2015," http://www.bls.gov/cpi/cpid1508.pdf, visited October 13, 2015.

[4] *Ibid.*